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No. 312

Supreme Court of the United States

OCTOBER TERM, 1963

W. P. KENNEDY, As President of the BROTHERHOOD OF RAILROAD TRAINMEN, et al., *Petitioners*,

v.

THE LONG ISLAND RAIL ROAD COMPANY, et al., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Dated: August, 1963.

TWENTIETH CENTURY PRESS, INC., CHICAGO 6

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COUNTERSTATEMENT OF THE CASE

This case grows out of a labor dispute between The Long Island Rail Road Company and the Brotherhood of Railroad Trainmen. The dispute arose from the Brotherhood's demand that the work week of Long Island trainmen engaged in short turn-around (commuter) service be cut to 5 days with no reduction in the pay received for a 6-day week. (App., pp. 21, 39; R., pp. 111-112; 591.)* During the period from November 2, 1959, to July 9, 1960, all procedures of the Railway Labor Act for settlement of a major dispute (negotiation, mediation, proffer of arbitration, and Emergency Board report) were exhausted, but no agreement was reached. (App., pp. 21-22, 39-40; R., pp. 111-121.) On July 10, 1960, the Brotherhood called its men out on

* "App." refers to the appendix to the Petition for Certiorari, where the opinions of the District Court and the Court of Appeals are printed. "R." refers to the printed record filed in this Court by petitioners. The stipulated facts and documents contained in the record were all received in evidence by the District Court as a single exhibit. (R., pp. 58-59.)

wide point of view and the interests of others instead of only its interests vis-a-vis plaintiffs . . ." * (App., pp. 27-28.). Rather, it was found (App., p. 28):

> "The insurance policy imposes no obligation on defendant requiring joint action or decision. In fact, it negates any such suggestions by specifically providing that 'the insured shall be free at any time, without prejudice to this insurance,' to make with the labor organization or organizations concerned an agreement that results in a termination of such work stoppage.' The Long Island's right to insurance payments in case of work stoppage covered by its policy was in no way dependent upon the popularity of the Long Island's bargaining position with other railroads.
>
> "The record shows that, at no time, was anyone but the Long Island conducting the bargaining through its own officers and for itself alone.
>
> "The counter offers made by the Long Island during the bargaining, its receptiveness to the recommendation of the Emergency Board, its willingness to submit the dispute with plaintiffs to arbitration, refute any contention that other roads controlled the Long Island in its bargaining under the Railway Labor Act."

REASONS FOR DENYING THE WRIT

The sole question which the petition presents for review is whether the railroads' strike insurance "constitutes a per se violation of the anti-trust policies of the United States . . ." (Petition, p. 3.) Petitioners have abandoned their claim under the Railway Labor Act, upon which they placed primary reliance in the District Court. That issue has been settled, adversely to petitioners, by decisions of

* The quoted findings are from a section of the District Court's opinion (dealing with alleged multi-employer bargaining) that the Court of Appeals approved and adopted. (App., p. 45 note 7.)

this Court, most recently the decision in *Brotherhood of Locomotive Engineers* v. *Baltimore & O. R. Co.*, 372 U. S. 284 (1963). For strike insurance was payable to the Long Island only after settlement procedures of the Railway Labor Act were exhausted, and in the *Engineers* case this Court ruled that parties to a rail labor dispute "having exhausted all of the statutory procedures, are relegated to self-help . . ." (372 U.S. at 291.) Cf. *N.L.R.B.* v. *Insurance Agents Union*, 361 U.S. 477 (1960).

Petitioners now attempt to portray this case as an antitrust case. But the record presents no question of importance in the administration of the antitrust laws. The railroads' strike insurance has no real relationship with the subject matter of the antitrust laws. Petitioners' claims fail, as the Court of Appeals ruled, "for the fundamental reason that [the provisions of the Sherman Act and Interstate Commerce Act upon which petitioners rely] were designed principally to outlaw restraints upon commercial competition in the marketing and pricing of goods and services and were not intended as instruments for the regulation of labor-management relations." (App., p. 46.) That ruling is unquestionably sound. It follows controlling authority, the decision of this Court in *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940). Accord, *Schatte* v. *International Alliance of Theatrical Stage Employes*, 182 F.2d 158, 167 (9th Cir. 1950), cert. denied, 340 U.S. 827 (1950). Cf. § 20 of the Clayton Act, 38 Stat. 738 (1914), 29 U.S.C. § 52; *United States* v. *Hutcheson*, 312 U.S. 219 (1941).

There is clearly no conflict in decisions for this Court to resolve. Petitioners' sole reliance (Petition, pp. 6-7) upon *Anderson* v. *Shipowners Assn.*, 272 U.S. 359 (1926), is misplaced. That case did not deal with any restraint upon a market for labor treated as a "commodity" but with a

restraint on the freedom of shipowners and operators to carry on commerce "according to their own choice and discretion." (272 U.S. at 365.) The concept underlying the *Anderson* decision is no longer law in light of the *Apex Hosiery* case, *supra*, where this Court held that hindrance of the operation of the vehicles of commerce does not constitute a restraint of trade. And, in any event, the *Anderson* case is inapplicable to the facts of the instant case because both courts below have found that no restraint on the freedom of the Long Island arose from its participation in the strike insurance program. (*Supra*, pp. 3-4.)

Petitioners sum up their argument that this is an antitrust case by stating that "the A. A. R. has been converted . . . to a giant, unregulated monopoly in the area of purchasing labor." (Petition, p. 7.) Even if this assertion were factually correct (and it is not), it raises no antitrust issue. As both the District Court and the Court of Appeals correctly stated, Section 6 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. §17, specifically provides that "the labor of a human being is not a commodity or article of commerce." (App., pp. 31, 47.)

The sole question presented in this damage action arising from a labor dispute—whether strike insurance "constitutes a per se violation of the anti-trust policies of the United States"—has been correctly decided by the courts below. Since none of the arguments advanced in the petition raise any issue not already settled by the decisions of this Court, no question is presented which is of sufficient substance to merit review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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